STATE OF MICHIGAN

IN THE SUPREME COURT

KERRY JENDRUSINA,

Plaintiff-Appellee,

v

SHYAM MISHRA, M.D., and
SHYAM N. MISHRA, M.D., P.C.,
Jointly & Severally,

Defendants-Appellants.
_____/

SC No. 154717
COA No. 325133
LC No. 13-3802-NH
(Macomb Circuit Court)

DEFENDANTS-APPELLANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

PLUNKETT COONEY

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STATEMENT OF SUPPLEMENTAL QUESTION PRESENTED

WHETHER PLAINTIFF'S CLAIM WAS PROPERLY DISMISSED UNDER MCR 2.116(C)(7) AND MCL 600.5838a(2) BECAUSE PLAINTIFF DISCOVERED OR SHOULD HAVE DISCOVERED HIS MALPRACTICE CLAIM BY JANUARY 3, 2011, WHEN HE WAS DIAGNOSED WITH END-STAGE RENAL DISEASE DESPITE ALLEGEDLY HAVING BEEN TOLD BY DEFENDANTS IN YEARS PRIOR THAT HIS KIDNEYS WERE FINE, AND PLAINTIFF FAILED TO FILE HIS CLAIM IN THE ENSUING SIX MONTHS?

Plaintiff-Appellee says "no."

Defendants-Appellants say "yes."

The trial court says "yes."

The Michigan Court of Appeals says "no."

SUPPLEMENTAL STATEMENT OF FACTS

A. Introduction.

This case arises from a physician-patient relationship spanning over two decades between Plaintiff-Appellee Kerry Jendrusina ("Plaintiff") and Defendant-Appellant internist Shyam Mishra, M.D. ("Dr. Mishra") (together with Defendant-Appellant Shyam N. Mishra, M.D., P.C., "Defendants"). Plaintiff alleges that Dr. Mishra failed to diagnose his kidney disease in light of blood tests showing declining kidney function, and to refer Plaintiff to a nephrologist early enough for Plaintiff to avoid suffering end-stage renal disease, renal failure, and the need for dialysis. Plaintiff testified that he was aware that Dr. Mishra tested his "kidney number," i.e., creatinine, found it slightly elevated, and ordered a kidney ultrasound in 2009, which was interpreted as normal. Dr. Mishra then reassured Plaintiff that his kidneys were "fine." Plaintiff understood that as long as his "kidney number" remained below five, his kidneys were fine.

Two years later, in January 2011, Plaintiff was suddenly hospitalized and diagnosed with end-stage renal disease, and started dialysis. Plaintiff knew then that his kidneys were "shot," and was told by his doctors and nurses that he was "way past the point" where he should have been on dialysis. However, Plaintiff claims that he should not have been charged with discovering a possible cause of action against Dr. Mishra until 20 months later, when Plaintiff's treating nephrologist informed him that earlier referral to a nephrologist could have prevented the need for dialysis.

On May 10, 2017, this Court granted oral argument on the application filed by Defendants from the August 4, 2016 Court of Appeals opinion finding that the trial court erred as a matter of law when granting summary disposition to Defendants based on the

"discovery rule" exception to the medical malpractice statute of limitations, MCL 600.5838a(2). This supplemental brief, filed pursuant to the Court's May 10, 2017 order, addresses the straightforward application of MCL 600.5838a(2) and this Court's opinion in *Solowy v Oakwood Hosp Corp*, 454 Mich 214; 561 NW2d 843 (1997) to the facts of this case. Consistent with the Court of Appeals Dissenting Opinion authored by Judge Jansen, this Court should find that Plaintiff's claim is time-barred because he should have discovered his claim on January 3, 2011, when he was diagnosed with end-stage renal failure and told that his lab values were way past where he should have been on dialysis:

> [P]laintiff knew that he had elevated kidney test levels. He also knew that Dr. Mishra performed an ultrasound test on his kidneys, which would have alerted a reasonable person to the fact that there might be an issue with his or her kidneys. In spite of plaintiff's elevated kidney levels and the ultrasound test, Dr. Mishra informed plaintiff that his kidneys were fine and that there was nothing to worry about. Plaintiff should have known that he had a possible cause of action when he learned that he had kidney disease, in spite of Dr. Mishra's statements to the contrary. Plaintiff's kidney failure was not a sudden event disconnected to his previous medical diagnoses and treatment. Instead, plaintiff was aware of the fact that Dr. Mishra was monitoring his kidneys and that he had elevated kidney levels, and plaintiff knew that Dr. Mishra performed an ultrasound test specifically to ensure that there was no issue with his kidneys. Therefore, plaintiff should have known of a possible cause of action when he learned that he had kidney failure on January 3, 2011.

Jendrusina v Mishra, 316 Mich App 621, 640-641; 892 NW2d 423 (2016) (Jansen, J., dissenting). Unlike the Majority Opinion, the Dissenting Opinion takes into account all of the relevant facts known to Plaintiff regarding Dr. Mishra's care of his kidneys at the time of his kidney failure and applies the correct legal standard under MCL 600.5838a(2) and *Solowy*.

Entirely absent from the Majority Opinion's "plain reading" of the text of MCL 600.5838a(2) (and Plaintiff's supplemental brief attempting to erase all previous

interpretations of the statute by this Court) is any analysis of the language in § 5838a(2) placing the burden squarely upon Plaintiff to prove, "as a result of physical discomfort, appearance, condition, or otherwise," that he neither discovered nor should have discovered his claim against Defendants prior to his September 2012 conversation with Dr. Tayeb. Plaintiff cannot satisfy this statutory burden by claiming that he had no reason to know of a possible claim against Dr. Mishra—the doctor monitoring his kidney function—until 20 months after his kidney failure, when another doctor actually pointed the finger at Dr. Mishra. A reasonable person in Plaintiff's position should have discovered a claim against Defendants during this time, and summary disposition is therefore required.

While Defendants stand behind their criticisms of the Majority Opinion in their Application for Leave to Appeal, they note that this Court need go no further than vacating the Majority Opinion and remanding for reinstatement of summary disposition for the reasons stated in the Dissenting Opinion. If this Court sees fit to entertain any of Plaintiff's arguments raised in his supplemental brief regarding the continued vitality of *Solowy* or the alleged ambiguity in § 5838a(2), those issues should be addressed by full briefing and argument on leave granted by this Court.

B. Material facts relevant to supplemental argument.

1. Dr. Mishra performs bloodwork and a kidney ultrasound to monitor Plaintiff's kidney function, telling Plaintiff in 2009 that his kidneys are "fine."

For over twenty years, Dr. Mishra treated and managed a number of Plaintiff's chronic conditions, including hypertension, high cholesterol, polycythemia, eosinophilia, edema, asthma, and sinus infections. In June 2007, Dr. Mishra diagnosed Plaintiff with

renal insufficiency (**Exhibit C**, Complaint, ¶ 8).[1] From that point forward, Dr. Mishra obtained regular bloodwork to monitor Plaintiff's kidney function. Plaintiff alleges that from April 2007 through December 2010, despite lab results showing that his kidney function was declining, Dr. Mishra failed to refer Plaintiff to a nephrologist or counsel Plaintiff on the importance of avoiding certain medications, blood pressure monitoring, and dietary modifications (**Exhibit C**, ¶¶ 11-12).[2]

Plaintiff testified in his deposition that, during that time period, he knew Dr. Mishra was performing annual blood tests which included a "kidney number," and that after each of these tests, Dr. Mishra informed Plaintiff that his "kidney number" was "okay" or "fine":

> Q. So *throughout the years*, and I'm looking at actually your Complaint here, you had like your BUN [blood urea nitrogen] and creatinine tested by way of labs that Dr. Mishra ordered?
>
> A. I didn't know about the BUN. He never told me about the BUN, if he did BUN.
>
> Q. You knew about the creatinine?
>
> A. He would go through the things, or the lady would go through the things, or the *doctor would go through the things with me and my wife and say*, your triglycerides, this, that, *and your kidney number*—I didn't know it was creatinine at the time—*was this, but as long as it's under five, you're fine, you're okay for now*. That's all I remember any kind of reference to kidney besides the ultrasound which he came back and said, "Your kidneys are fine."

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[1] All exhibit references are to exhibits filed with Defendants' Application for Leave to Appeal, and exhibits are not refilled with this supplemental brief.

[2] The factual and legal allegations in Plaintiff's complaint are accepted as true only for purposes of the statute of limitations analysis. Defendants deny all claims of malpractice and affirmatively state that Dr. Mishra complied with the standard of care in his treatment of Plaintiff in all respects. Plaintiff was always thoroughly advised as to the status of his kidney disease and was timely referred to a nephrologist for evaluation and further management of same.

Q. Fair enough, but you knew the creatinine number, they were looking at that to gauge your kidneys; correct?

A. I thought it was just another number he had looked at. I didn't know if it was related to the Simvastatin or what. I don't know why they were looking at the creatinine.

Q. I'm sorry. I thought you just told me that either he or the nurse said this is your kidney number?

A. *They said the kidney number*. I didn't know why they were looking at it. Your question was—I don't know why they were looking at it *but they said the number was okay*.

Q. In relation to your kidneys?

A. *They did say in relation to your kidneys it was fine*.

Q. And *they had been monitoring that* among other labs—

A. Yeah.

Q. --*for years*?

A. *Yeah, I trusted him. Whatever he said was good was good*.

* * *

A. ....I said I was with an internist. *The internist said everything was fine as long as the creatinine number was down a certain thing, you'd be fine*.

(**Exhibit D**, deposition, pp 58-59, 83) (emphasis supplied).

In December 2008, Plaintiff recalls that Dr. Mishra told him that his kidney values were "a little bit elevated," but that there was no cause for concern (Id. at 47-48). He denies that Dr. Mishra told him in 2007 that he was suffering from chronic kidney failure, although it is noted in his chart (Id. at 56). Plaintiff testified that he was experiencing swelling in his legs at that time (a sign of renal failure) (Id. at 46-48). Accordingly, Dr. Mishra ordered a kidney ultrasound to rule out renal failure in early 2009. Plaintiff understood that the kidney ultrasound performed in early 2009 was ordered after his

"kidney number" came back slightly elevated, and that the test was done to check his kidney function after Plaintiff experienced swelling in his legs (Id. at 46-48). Dr. Mishra allegedly informed Plaintiff that his kidneys were "fine" following the ultrasound (Id. at 51-52).

After the 2009 kidney ultrasound, Plaintiff continued to treat with Dr. Mishra and to undergo regular testing for his kidney function. While Plaintiff denies that he ever received hard copies of his test results, he remembers Dr. Mishra telling him at some point that as long as his "kidney number" was below five, that his kidneys were fine (Id. at 58-60). Plaintiff confirmed that by "kidney number," he meant creatinine (Id. at 58, 83).

2. Plaintiff is diagnosed with end-stage renal failure in January 2011 and starts dialysis.

In January 2011, Plaintiff again experienced swelling in his legs. On January 3, 2011, Plaintiff presented to Henry Ford Macomb Hospital with what he thought was a severe case of the flu. Instead, he underwent another kidney ultrasound and a kidney biopsy, was diagnosed with acute renal failure and end-stage renal disease, and began hemodialysis during his hospital stay (**Exhibit C**, ¶¶ 13-14). Plaintiff confirmed that as of January 2011, he knew that he "was in full kidney failure, kidneys were shot, basically" (**Exhibit D**, p 66). Importantly, Plaintiff claims that the doctors and nurses caring for him in January 2011 told him that his lab values were "way past where [he] should be on dialysis" (Id. at 62-63).

After his diagnosis, Plaintiff began seeing two nephrologists, Dr. Provenzano and his partner, Dr. Jukaku Tayeb, and continued with dialysis to treat his end-stage renal disease. Shortly after his discharge from the hospital, Plaintiff met with Dr. Provenzano to review the results of the kidney biopsy.

In October 2011, Dr. Tayeb recommended Plaintiff obtain a kidney transplant (Id. at 66-67). Plaintiff had been researching kidney transplants on the internet (Id.). Plaintiff elected to continue with home dialysis instead and remains on dialysis at the present time.

Plaintiff claims that he was not aware of his malpractice claim against Defendants until September 20, 2012, when Dr. Tayeb allegedly informed him that an earlier referral to a nephrologist would have delayed or eliminated his need for dialysis and a kidney transplant. Accordingly, Plaintiff did not file a notice of intent naming Defendants and alleging Defendants committed medical malpractice by failing to timely diagnose and treat his kidney disease until March 18, 2013—over *two years* after he was diagnosed with end-stage renal disease.

SUPPLEMENTAL ARGUMENT

PLAINTIFF'S CLAIM WAS PROPERLY DISMISSED UNDER MCR 2.116(C)(7) AND MCL 600.5838a(2) BECAUSE PLAINTIFF DISCOVERED OR SHOULD HAVE DISCOVERED HIS MALPRACTICE CLAIM BY JANUARY 3, 2011, WHEN HE WAS DIAGNOSED WITH END-STAGE RENAL DISEASE DESPITE ALLEGEDLY HAVING BEEN TOLD BY DEFENDANTS IN YEARS PRIOR THAT HIS KIDNEYS WERE "FINE," AND PLAINTIFF FAILED TO FILE HIS CLAIM IN THE ENSUING SIX MONTHS.

A. It is Plaintiff's burden to show satisfaction of the discovery rule, a narrow exception to the favored statute of limitations defense.

The standard period of limitation for a malpractice action is two years. MCL 600.5805(6). Plaintiff does not dispute that his claim would be time-barred under § 5805(6), but rather argues that Michigan's six-month "discovery rule" set forth in MCL 600.5838a(2) applies as an alternative means for commencing the running of the statutory period. The statute states as follows:

> (2) Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. However, except as otherwise provided in section 5851(7) or (8), the claim shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim. *The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff*. A medical malpractice action that is not commenced within the time prescribed by this subsection is barred.

(emphasis supplied).

The purpose of MCL 600.5838a(2) as a statute of limitations—particularly, to promote diligence among potential plaintiffs—must form the foundation of any attempt at judicial construction and application of the statute. Nearly 100 years ago, this Court

adopted the United States Supreme Court's view that "[s]tatutes of limitations are vital to the welfare of society and are favored in the law." *Ramsey v Child, Hulswit & Co*, 198 Mich 658, 671; 165 NW 936 (1917) (quoting *Wood v Carpenter*, 101 US 135, 139 (1879)). In ruling that adoption of the discovery rule in asbestos cases would not interfere with the policy behind statute of limitations, this Court described the "primary purposes behind statutes of limitations [as]: (1) to encourage plaintiffs to pursue claims diligently, and (2) to protect defendants from having to defend against stale and fraudulent claims." *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 311; 399 NW2d 1 (1986). See also *Moll v Abbott Laboratories*, 444 Mich 1, 30; 506 NW2d 816 (1993) (Boyle, J., concurring) ("The concept of reasonable diligence is implicit in the discovery rule and the reasonable person test is sufficiently flexible enough to permit fact-specific application regarding whether a plaintiff knew or should have known of the fact of injury and a causal connection"). Thus, any application of the statute of limitations or an exception thereto—including the discovery rule—must be done with consideration of what it means for a plaintiff to "diligently" pursue the factual and legal aspects of his or her claim. Plaintiff cannot write this "diligence" requirement out of § 5838a(2) simply by observing that the Legislature did not specifically mention it in the statute.

Consistent with this favored status, exceptions to statutes of limitation are to be construed strictly. *Michigan Millers Mutual Ins Co v West Detroit Building Co, Inc*, 196 Mich App 367, 374; 494 NW2d 1 (1992). The purpose of a "discovery rule" exception to a statute of limitations, such as the six-month discovery rule applicable to medical malpractice claims, is to prevent "unjust results" when "a plaintiff would be otherwise denied a reasonable opportunity to bring suit because of the *latent nature* of the injury or the

inability to discover the causal connection between the injury and the defendant's breach of duty owed to the plaintiff." *Lemmerman v Fealk*, 449 Mich 56, 65-66; 534 NW2d 695 (1995) (emphasis supplied). Where the discovery rule is found appropriate, a plaintiff is deemed to have discovered a cause of action when the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, an injury and its possible cause. *Gebhardt v O'Rourke*, 444 Mich 535, 545; 510 NW2d 900 (1994). Even under the discovery rule, a claimant must take diligent steps to discover a cause of action and cannot simply wait for others to inform him or her of the existence of a cause of action. *Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995).

Plaintiff's stated fear that medical practitioners will simply conceal their malpractice from their patients to prevent them from discovering a possible claim is already addressed in MCL 600.5838a(2)(a), providing for tolling of the statute of limitations based on fraudulent concealment by a physician of a cause of action (Plaintiff's Supplemental Brief, p 17). Plaintiff did not plead fraudulent concealment here, and no "independent medical research" was required to discover the existence of Plaintiff's claim (Id.).

The plaintiff has the burden of invoking and establishing the applicability of the discovery rule, by "proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim" more than six months before the action was commenced. § 5838a(2). As explained *infra*, Plaintiff has not even attempted to meet that burden in this case. The Majority Opinion improperly assigned that burden to Defendants. See Defendants' Application for Leave to Appeal, pp 28-30.

B. Plaintiff cannot overcome the objective "possible cause of action" standard set forth by this Court in *Solowy*.

This Court's leading case on the discovery rule in medical malpractice cases is *Solowy v Oakwood Hosp Corp*, 454 Mich 214; 561 NW2d 843 (1997). In *Solowy*, the Court conclusively confirmed that Michigan has an objective standard for the discovery of possible malpractice claims under the six-month discovery rule. Under this standard, "the plaintiff need not know for certain that he had a claim, or even know of a likely claim before the six-month period would begin. Rather, the discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action." 454 Mich at 222. Specifically, the standard does not require the plaintiff to know that the injury "was in fact or even likely caused by the defendant doctors' alleged omissions," nor does the standard require that the plaintiff is aware of the "full extent of [the] injury before the clock begins to run." *Id*. at 224. This "possible cause of action" standard requires only "some *minimum level of information* that, when viewed in its totality, *suggests a nexus* between the injury and the negligent act." *Id.* at 226 (emphasis supplied).

In *Solowy*, the plaintiff had had a cancerous lesion removed from her left ear by the defendant dermatologists, who assured her during the course of her treatment that the cancer was "gone" and that there was no chance of it recurring. 454 Mich at 216-217. The plaintiff claimed that the defendants failed to advise her that she should return for further follow-up or treatment, or that the cancer could potentially recur. *Id.* Five years after her final appointment with the defendants, the plaintiff discovered a similar lesion at approximately the same site as the removed cancer, and consulted a different dermatologist, who initially advised her that there were two possible diagnoses for the

lesion: either the cancer had returned, or it was a noncancerous lesion. *Id.* at 217. A biopsy of the lesion revealed that it was indeed cancerous, and its advanced stage meant that a surgeon had to remove the entire top portion of the plaintiff's left ear to remove all of the cancerous cells. *Id*. The plaintiff sued the defendant dermatologists, claiming that their misrepresentations that the cancer would not recur caused her to delay seeking treatment, resulting in a more radical and disfiguring surgery than would have been required if she had sought treatment earlier. The plaintiff claimed her suit was timely filed under the six-month discovery rule because it was filed within six months after the date her treating dermatologist confirmed the second lesion was indeed cancerous.

The defendants moved for summary disposition under MCR 2.116(C)(7), arguing that the plaintiff should have discovered her claim on the date of her first visit with the treating dermatologist, when she was informed that the lesion was possibly a recurrence of cancer. The Court, defining and applying the objective standard for Michigan's discovery rule, affirmed the grant of summary disposition to the defendants, finding that once the plaintiff was aware that the lesion could be a recurrence of cancer, the "possible cause of action" standard was met. *Id.* at 225. This is because the plaintiff was also aware, as of that date, that her injury was possibly caused by her former dermatologists' failure to inform her that the cancer could recur and that she should seek follow-up treatment. *Id.* at 224. The Court emphasized that Michigan's "possible cause of action standard does not require that the plaintiff know that the injury to her ear, in the form of the advancement of the disease process, was in fact or even likely caused by the defendant doctors' alleged omissions," or that the plaintiff know that the progression of cancer would eventually

require removal of a far larger portion of her ear than if she had sought treatment earlier. *Id*. at 224-225.

Here, like the plaintiff in *Solowy*, Plaintiff alleges that he was negligently informed by Dr. Mishra that his kidney function was "fine," and that there was no cause for concern about his kidneys or need to see a nephrologist for follow-up treatment after his "normal" kidney ultrasound in early 2009. This understanding of his condition was definitively changed only two years later in January 2011, when Plaintiff again had a kidney ultrasound performed, was diagnosed with end-stage renal disease, and informed that his "kidney number" was "way past" the point where he should have been on dialysis. The trial court's written opinion reflects that it correctly applied Michigan's six-month discovery rule to the objective facts of this case to find Plaintiff's claim was untimely filed:

> The Court opines that plaintiff should have discovered his claim by January 3, 2011, when he started hemodialysis, at which time there was no question that he was diagnosed with end-stage renal disease. As of that time, plaintiff should have been aware that such diagnosis was contradictory to defendants' diagnosis. As addressed above, plaintiff testified that defendants had informed him there was nothing to worry about in terms of his kidneys. *Solowy*, *supra*; *McGuire*, *supra*. Thus, plaintiff had 6 months from such date within which to file his claim, or, more specifically, he should have filed his claim by July 3, 2012 at the latest. Since he failed to do so, his claim is time-barred.

(**Exhibit F**, p 4).

Like the plaintiff in *Solowy*, Plaintiff was made aware that his treating physician's alleged representations of his kidney function as "nothing to worry about" were inaccurate and that his kidneys were indeed severely damaged—to use Plaintiff's words, "basically shot." In fact, Plaintiff was even more aware of the possible connection between his injury and Dr. Mishra's alleged failure to properly treat him than the plaintiff in *Solowy* because Plaintiff was <u>*unequivocally*</u> informed in January 2011 that his kidneys were failing (i.e., not

"fine"), that dialysis was necessary, and that (according to the St. John doctors and nurses) he should have been on dialysis a long time ago. In *Solowy*, there was at least a question initially whether the plaintiff's lesion was indeed cancerous or benign, such that she could not be absolutely sure that an injury had occurred until she obtained a definitive diagnosis. The Court rejected this argument, finding that after the initial visit raising the possibility of cancer, "the plaintiff, while lacking specific proofs, was armed with the requisite knowledge to diligently pursue her claim." *Id.* at 225.

Applying the *Solowy* standard to the objective facts in this case, a reasonable person should have discovered, in January 2011, that Dr. Mishra had possibly professionally erred with respect to treatment of Plaintiff's kidneys. Plaintiff recalled that in December 2008, Dr. Mishra told him that his kidney values were "a little bit elevated," but that there was no cause for concern. Plaintiff knew that the kidney ultrasound performed in early 2009 was ordered after his "kidney number" came back slightly elevated, and indicated that his kidneys were "fine." Plaintiff's understanding of his kidney function as of 2009 was that his kidneys were "fine" so long as his "kidney number" was below a certain level (5, to be precise). He was told by his doctors in January 2011 that his "number" was "way past" the point where he should have been receiving treatment for his kidneys, i.e., dialysis. This worsening of his kidney function, as evidenced by the objective increase in Plaintiff's "kidney number" from "fine" to "way past" the need for dialysis, necessarily took place between 2009 and 2011, during which time Plaintiff knew Dr. Mishra was testing his "kidney number" (or, at the very least, Plaintiff knew he had a "kidney number" by which his kidney function could be monitored). A reasonable person in Plaintiff's position should then have known in January 2011 that either Dr. Mishra should have been monitoring

Plaintiff's "kidney number" and was not, or that Dr. Mishra had continued to monitor Plaintiff's 'kidney number," but had failed to inform him about the results. Either conclusion would support a possible cause of action, and neither requires any degree of independent medical research. See Defendants' Application for Leave to Appeal, pp 34-35.

Even without knowledge of his lab values, Plaintiff should have discovered "a possible cause of action" against Dr. Mishra in January 2011, following his diagnosis of end-stage renal disease. *Solowy*, 454 Mich at 223. The possible cause of action standard does not require the plaintiff to know that the injury "was in fact or even likely caused by the defendant doctors' alleged omissions;" only that Plaintiff possess "some minimum level of information that, when viewed in its totality, suggests a nexus between the injury and the negligent act." *Id.* at 226. Plaintiff knew, after a kidney ultrasound in the hospital, that his kidneys were suddenly "shot" only two years after having the same test performed and being told by Dr. Mishra that his kidneys were "fine." On the basis of these objective facts, there were several possible nexuses between Dr. Mishra's alleged acts or omissions and Plaintiff's irreversible kidney failure which a reasonably objective person would have realized:

- Dr. Mishra had negligently misread the 2009 ultrasound, and had failed to diagnose early-stage renal disease.
- Dr. Mishra had misread his "kidney number" when it was tested between 2009 and 2011, and had not noticed the rising levels until Plaintiff was "way past" the point where he should have been on dialysis.
- Dr. Mishra had mismanaged Plaintiff's other conditions and medications, causing Plaintiff to develop kidney disease.
- Dr. Mishra had failed to continue to test Plaintiff's "kidney number" between 2009 and 2011

- And, as Plaintiff ultimately alleged, Dr. Mishra had noticed Plaintiff's rising "kidney numbers" but failed to timely refer Plaintiff to a nephrologist.

Such realizations, individually and certainly in the aggregate, are sufficient to charge Plaintiff with discovery of a possible cause of action against Defendants. "Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Solowy*, 454 Mich at 223.

The Majority's reliance on the possibility that Plaintiff's kidney failure in January 2011 could have been caused by an acute condition (which would not implicate Dr. Mishra as negligent) does not render a cause of action against Dr. Mishra any less possible, based on the objective facts then known to Plaintiff. It is ***Plaintiff's burden*** under § 5838a(2) to prove that, "as a result of physical discomfort, appearance, condition, or otherwise, [he] neither discovered nor should have discovered the existence of the claim" more than six months before the action was commenced. Plaintiff failed to satisfy that burden in the trial court or the Court of Appeals, and fails to do so before this Court. Instead, Plaintiff resorts to attacking the foundational principles of § 5838a(2) as a statute of limitations, and this Court's 20+ years of precedent applying § 5838a(2). Plaintiff attempts to satisfy § 5838a(2) not by discussing why his appearance, condition, or physical discomfort prevented him from earlier discovering his claim, but rather by arguing that he could not prove the causation element of his claim until Dr. Tayeb informed him that earlier referral or treatment by Dr. Mishra would have prevented his kidney failure. This approach was squarely rejected in *Solowy*, as this Court held that "the plaintiff need not be able to prove each element of the cause of action before the statute of limitations begins to run." 454 Mich at 224. Again, all that is required is awareness of an injury and its possible cause. That standard was satisfied here.

RELIEF REQUESTED

WHEREFORE, Defendants-Appellants respectfully request this Court vacate the Court of Appeals Majority Opinion, adopt the Dissenting Opinion authored by Judge Jansen, or alternatively grant leave to appeal and reinstate summary disposition for Defendants.

Respectfully submitted,

PLUNKETT COONEY

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Dated: July 12, 2017

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SC No. 154717
COA No. 325133
LC No. 13-3802-NH
(Macomb Circuit Court)

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

MONIQUE VANDERHOFF deposes and says that she is an employee with the firm of PLUNKETT COONEY, and that on July 12, 2017, she caused to be served a copy of the attached Defendants-Appellants' Supplemental Brief in Support of Application for Leave to Appeal and Proof of Service/Statement Regarding E-Service, upon the following:

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